ORIGINAL

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**



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| In the Matter of | ) | |
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| Implementation of Section 3(n) and 332 of the Communications Act | ) | GN Docket No. 93-252 |
| | ) | |
| | ) | |
| Regulatory Treatment of Mobile Services | ) | |



To: The Commission

## PETITION FOR RECONSIDERATION

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## SUMMARY

G&M Wireless Communications, Inc. ("G&M") requests the Commission to reconsider a portion of its Third Report and Order by retaining the first-come, first-served rule for filing Cellular Radio unserved area Phase II applications, as it has done for Phase I applications. The Commission's decision to create a 30 day filing window will permit "copycat" applications to be submitted based upon information gleaned from the hard work and expenditures of Phase II entrepreneurs who discover cellular "white" areas. The unique efforts of these entrepreneurs should not be rewarded by a process that encourages filings by speculators as well as incumbent cellular licensees who choose not to file within their protected five year fill-in periods.

The Commission made the correct decision in 1991 when it established procedures for the filing of applications for unserved cellular areas. At that time it explicitly rejected 30-day filing windows for the cellular unserved area service as not meeting its own processing goals.

Neither subsequent changes to the Communications Act of 1934 nor evidence presented in this rule making justify upsetting a process that has been successful in attracting entrepreneurs to seek out cellular unserved areas and provide cellular service to members of the public who to date have been denied cellular radio service by incumbent licensees.

In fact, the record indicates that the Commission has changed its rule for an improper purpose -- to increase the number of Phase II applications found to be mutually-exclusive and thus subject to competitive bidding procedures. Congress, in creating competitive bidding authority for the Commission in Section 309(j) of the Communications Act, expressly prohibited the agency from changing its rules for the purpose of generating more mutually exclusive situations -- and greater auction revenues.

The existing processing rules meet the goals established by the FCC for processing cellular unserved area applications. The current rules do not create an artificial incentive for the public to submit applications, since the potential applicant must rely upon its own work product, not that of competitors for the spectrum assignment.

The rules promote the careful upfront efforts of potential applicants in completing engineering, cost-analysis and geographic area searches as this work is done with their own resources.

Both the Phase I one day window and Phase II series of deadlines limit the number of mutually exclusive situations the Commission would otherwise face -- a result favored by Congress -- which speeds the processing of applications and results in more rapid initiation of cellular service to unserved areas -- the ultimate public interest.

The process does not "blindside" any sincere entrepreneur or cellular incumbent as the public has been made aware of the rules for at least five years and the series of Phase I and Phase II filing deadlines provide a minimum of 32 days prior notice to any legitimate applicant.

The process also properly rewards the efforts of entrepreneurs and others who discover unserved areas and expend significant resources to prepare applications by protecting these spectrum prospectors.

G&M proposes three amendments that are consistent with the FCC's processing goals. First, provide an additional 30-day notice when no Phase I applications are filed so the public always has at least 30 days prior notice before the Phase II process begins. Second, if the Commission decides to retain a 30-day filing window, do not release the initial Phase II application for public inspection until the filing period has ended. Finally, G&M suggests that in the Phase II auctions that do occur, the first Phase II applicant in a filing group should receive bidding preferences that serve as a reward for its discovery of unserved cellular areas.

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To: The Commission

## PETITION FOR RECONSIDERATION

G&M Wireless Communications, Inc. (hereinafter referred to as "G&M"), by its attorney, petitions the Commission to reconsider its Third Report and Order in the above-captioned proceeding. This decision appeared in the Federal Register on November 21, 1994.[1] G&M's petition is timely-filed in accordance with FCC rules 1.4(b) and 1.429 and Section 405 of the Communications Act of 1934.

G&M requests that the Commission retain the first-come, first-served rule for filing cellular unserved area Phase II applications, as it has done for Phase I applications.[2]

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[1] 59 F.R. 599945 (Monday, November 21, 1994). Third Report and Order in GN Docket 93-252, Implementation of Sections 3(n) and 332 of the Communications Act-Regulatory Treatment of Mobile Services, FCC 94-212, released September 23, 1994. (hereinafter referred to as "Third Report and Order").

[2] 47 C.F.R. §22.949(b)(2) (1994). The Petitioner recognizes that the Commission characterizes its procedure for Phase I applications as "one day windows," not "first-come, first-served." The Petitioner asks that the Commission retain this rule, however it characterizes it, since the entire unserved area process acts to prohibit potential mutually-exclusive applicants from viewing a Phase I or Phase II application and then filing a later application based upon the content of the earlier-filed application. In contrast, the Petitioner wholeheartedly supports retention of the 30 day period for filing a Petition to Deny against a filed Phase I or Phase II application, as required by the Communications Act of 1934. 47 U.S.C. §309(d).

## I. BACKGROUND

G&M Wireless Communications, Inc. is a privately-held Ohio corporation. It is a small, start-up enterprise established to seek out and participate in wireless communications business opportunities such as cellular radio, paging and PCS. In an attempt to provide service to cellular unserved areas, G&M has been working for months to compile a data base of existing and pending cellular license sites. This has required it to analyze SIU maps, the Commission's cellular data base and cellular applications. From this research, G&M has created its own proprietary data base identifying areas unserved by cellular telephone as well as other commercial mobile radio services. G&M has devoted three staff members to this task and estimates that it has spent approximately $100,000 on this effort alone. It expects to file both Phase I and Phase II applications as protected five year fill-in periods expire or Phase I concludes in a particular MSA/RSA.

G&M entered this business with the expectation that the Commission's processing rules would protect it from competitors -- both other potential Phase II entrepreneurs and existing cellular licensees -- who would take advantage of the efforts of G&M to file "copy cat" applications. Had the FCC adopted a 30-day filing window rule for Phase II applications in 1991, G&M would not have launched this expensive effort. The Commission's decision to change the processing rule in the midst of the opportunity to file Phase II applications is patently unfair to companies such as G&M who have made significant investments in the Phase II process.

G&M asks the Commission to recognize that cellular fill-in applications are unique. The onus is on the applicant to identify usable spectrum within unserved geographic areas. Typically, an FCC applicant applies for radio spectrum and geographic areas set out by the Commission. The Commission should reward Phase II unserved area "prospectors" who expend significant resources in finding unserved areas by limiting the opportunity for others to profit from their efforts -- as it continues to do for Phase I applicants.

## II. THE FCC MADE THE CORRECT DECISION IN 1991 WHEN IT CREATED FIRST-COME, FIRST-SERVED PROCEDURES FOR CELLULAR PHASE II APPLICATIONS

The FCC adopted cellular unserved area rules in 1991.[3] These rules, adopted after extensive notice and comment procedures, created the correct balance between competition and fairness in the filing of Phase I and Phase II unserved area applications. The Commission has not identified a legitimate reason for changing these recently-adopted rules.

The FCC first proposed cellular unserved area rules in 1990.[4] For those cellular unserved areas where the date for filing would occur after the end of the incumbent licensee's five year fill-in period (later characterized as Phase I), the

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[3] First Report and Order and Memorandum Opinion and Order on Reconsideration in CC Docket No. 90-6, Amendment of Part 22 of the Commission's rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, 6 FCC Rcd 6185 (1991); upheld upon reconsideration, Third Report and Order and Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 7183 (1992). (hereinafter referred to as "Unserved Area First Report and Order")

[4] Notice of Proposed Rule Making in CC Docket No.90-6, Amendment of Part 22 of the Commission's Rules to Provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, 5 FCC Rcd 1044 (1990). (hereinafter referred to as "Unserved Area NPRM").

Commission initially proposed "traditional" cut-off procedures.[5] Applications filed after those that had been filed at the conclusion of the five year fill-in period (later characterized as Phase II) would be considered mutually exclusive if submitted within 30 days after the date of public notice listing the first conflicting application -- the cut-off date.[6]

When the FCC adopted application filing procedures and the method of determining mutual exclusivity in its Unserved Area First Report and Order, the Commission identified several conflicting goals that it desired to meet.

1. Ensure that it did not create an artificial incentive for parties to file applications for unserved areas;

2. Ensure that applicants are able to propose facilities that make engineering sense, are cost-effective, and cover geographic areas the applicant actually wants to serve;

3. Process applications in as rapid a manner as possible to promote prompt service to the public;

4. Provide sincere applicants with a fair opportunity to participate in the application process.[7]

After weighing these goals and the public comments, the Commission explicitly abandoned its proposal to use a 30 day cut-off period for unserved area applications, instead adopting a "compromise procedure" to meet its goals. As the

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[5] "Notice and cut-off procedures are the traditional method the Commission has utilized in a variety of different licensing processes to define the existence of competing applications. The procedures give potential competing applicants a fair opportunity to file for an unserved area when, by chance, another applicant has simply beaten a competitor to the door with an application. At the same time the cut-off period is fair to the first filer by establishing a date certain beyond which no competing applications may be filed, Unserved Area NPRM, 5 FCC Rcd 1044, 1046 (1990).

[6] The Commission again noted that 30 days "strikes a reasonable balance between providing prompt service and giving competing applicants a reasonable period of time to prepare and file a competing application." Unserved Area NPRM at 1046.

[7] Unserved Area First Report and Order, 6 FCC Rcd 6185, 6196 (1991)

Commission noted, "[w]e believe that this approach strikes a fair balance in meeting the above-stated, conflicting goals."[8] Phase I cellular unserved area applications would be filed in a one day filing window on the 31st day after the end of each five year fill-in period. Phase II unserved area applicants could file in a market already licensed during Phase I beginning on the 121st day after a construction authorization had been issued, on the 31st day after the last Phase I application was dismissed in a market if no authorizations were issued, or on the 32nd day after the close of the five year fill-in period if no Phase I application had been filed. Phase II applications would be granted on a first come, first served basis.[9]

## III. THE FCC HAS FAILED TO IDENTIFY A LEGITIMATE REASON FOR MODIFYING THE PHASE II PROCEDURES THAT MET ITS ORIGINAL GOALS FOR UNSERVED CELLULAR AREA PROCESSING

The FCC amended its Phase II cellular unserved area processing rules from first-come, first-served to 30-day filing windows as part of its implementation of the Omnibus Budget Reconciliation Act of 1993 (hereinafter "Budget Act"), which modified Sections 3(n) and 332 of the Communications Act.[10] At the same time, the Commission retained its one day windows for Phase I applications. The Budget Act did not require the Commission to make such a change. In fact, the Budget Act's legislative history speaks against the Commission's attempt to promote mutually exclusive application situations to increase auction revenues. Nor do the comments in

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[8] Unserved Area First Report and Order at 6196.

[9] Unserved Area First Report and Order at 6197 and "Filing Procedures-Appendix C at 6238. Codified at 47 C.F.R. §22.949.

[10] Omnibus Budget Reconciliation Act of 1993, Public Law No. 103-66, Title VI, §6002(b), 107 Stat. 312, 392 (Budget Act).

this proceeding support a change in the first-come, first-served rule. The Commission's attempt to distinguish between Phase I and Phase II procedures in order to justify retention of the Phase I rule while changing the Phase II rule is arbitrary and capricious. Finally, the Commission has modified a recently-created rule without proper justification. This change will injure the petitioner and other Phase II applicants who have expended considerable resources in preparing to file in unserved cellular areas.

### A. The Budget Act does not require the FCC to modify its existing Phase II rule for determining mutual exclusivity to a 30 day "Cut-Off" Procedure

Section 6002(b) of the Budget Act directs the Commission to impose similar or comparable statutory requirements on commercial mobile radio service (CMRS) providers[11]. As Congress noted, it was the intent of the legislation to ensure that commercial mobile services be treated as common carriers, except for those portions of Title II of the Communications Act that the Commission determines shall not apply.[12] Congress expressly granted the Commission flexibility to recognize the differences between radio services in considering regulatory requirements.[13] This flexibility clearly extends to the Commission's consideration of the specific processing and operational rules of the individual commercial mobile radio services within Parts 22 and 90 of its rules, including its cellular unserved area rules. In short, the Budget

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[11] 47 U.S.C. §332(c)(1).

[12] Conference Report of the Committee on the Budget on the Omnibus Budget Reconciliation Act of 1993, H.R. Rep. No. 213, 103rd Cong. 1st Sess. 490-491 (1993). ("Conference Report").

[13] "The purpose of this provision [332(c)(1)(C)] is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services.....[T]his provision permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier." Conference Report at 491.

Act cannot be read to require uniform rules for the processing of CMRS applications nor does the statute direct the Commission to amend its rules for any particular commercial mobile radio service unless such amendment is justified by changed conditions identified through a rule making.

### B. The Budget Act directs the Commission to ignore the potential for competitive bidding revenues in its consideration of radio service rules.

In implementing the Budget Act as to commercial mobile radio services, the Commission concluded that where it has authority to select from among mutually exclusive applications through competitive bidding, it would be advantageous to use filing windows that allow for the submission of competing applications rather than first-come, first-served procedures.[14] The Commission also noted that it retained authority to use first-come, first-served procedures and short filing windows to reduce the possibility of frivolous applications. The Commission also proposed to continue with a one day filing window for Phase I "because applications will be accepted on a date certain that potential applicants can determine well in advance of the filing window." Phase II applications would be subject to a 30-day filing window "because we see no reason to treat the licensing of Phase II applications in a manner that differs from our licensing of all other Part 22 license applications."[15]

The Commission has impermissibly considered the prospect of competitive bidding in changing its Phase II process --as well as all commercial mobile service

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[14] Further Notice of Proposed Rule Making in GN Docket No. 93-252, Implementation of Sections 3(n) and 332 of the Communications Act-Regulatory Treatment of Mobile Services, 9 FCC Rcd 2863, 2888 (1994). (hereinafter referred to as "Further Notice").

[15] Further Notice at 2888-2889.

processes -- for determining mutual exclusivity among applicants. Congress expressly directed the Commission not to consider competitive bidding in its operational and processing rules. Section 309(j)(6)(E) states that competitive bidding should not be construed to relieve the Commission of the obligation in the public interest to continue using engineering solutions, negotiation, threshold qualifications, service regulations and other means to avoid mutual exclusivity in applications.[16] The legislative history is also clear as to the Commission's obligation to avoid mutually-exclusive situations.

> In connection with application and licensing proceedings, the Commission should, in the public interest, continue to use engineering solutions, negotiation, threshold qualifications, service rules, and other means to avoid mutually exclusive situations, as it is in the public interest to do so.(emphasis added).
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> H.R. Rep. No. 111, 103 Cong., 1st Sess. 12 (1993)[17]

The Commission has failed to identify reasons other than the onset of its competitive bidding authority for changing its mutual exclusivity rules for CMRS in general and Phase II cellular applications in particular.[18] The Petitioners respectfully submit that the Commission has ignored the congressional admonition to avoid mutually exclusive situations and changed its rules to create more mutually exclusive applications in order to increase competitive bidding revenues.

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[16] 47 U.S.C. §309(j)(6)(E). See also, 47 U.S.C. §309(j)(7): Commission may not base a spectrum allocation determination on the expectation of auction revenues or issue rules under 309(j)(4)(C) on such an expectation. Section 309(j)(4)(C) directs the Commission to prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services.

[17] See also, Conference Report at 485.

[18] See paragraphs 120-124 of the Further Notice; paragraphs 322, 333 of the Third Report and Order.

### C. The record does not support a change in the Phase II procedure nor has the Commission made a reasoned distinction between the Phase I and Phase II rules that justifies an amendment to only the Phase II process

The Commission itself recognizes that the record established in this proceeding does not support a change in the Phase II processing rules established only in 1991.[19] While the Commission always has authority to change its rules, it must justify the change with a reasoned analysis.[20] The Commission has identified no justification for a change in the Phase II first-come, first-served rule since it adopted the First Report and Order. The cellular unserved area application process has not revealed, to G&M's knowledge, any behavior by Phase II applicants that would necessitate a change in the rule. Nor has the Commission demonstrated how the change to the 30-day filing window would meet the goals it identified in the Unserved Area First Report and Order,[21] particularly since it expressly rejected 30-day windows for unserved area applications in that proceeding.

The comments in this rule making recognize the special attributes of cellular unserved area applications and urge the Commission to retain first-come, first-served procedures.[22] The comment supporting a change to a 30-day window, that of BellSouth, should give the Commission pause. BellSouth opposes the first-come, first-served process because it forces incumbent licensees to file on the first day of the

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[19] Third Report and Order at ¶331.

[20] Simmons v. ICC, 829 F.2d 150, 155 (D.C. Cir. 1987); National Family Planning v. Sullivan, 979 F.2d 227, 234 (D.C. Cir. 1992); International Brotherhood of Teamsters v. U.S., 735 F.2d 1525 (D.C. Cir. 1984); CBS v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971); Greater Boston Television Corporation v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970); Atchinson, Topeka & Santa Fe Railroad v. Wichita Board of Trade, 412 U.S. 800, 807-809 (1972).

[21] Unserved Area First Report and Order, 6 FCC Rcd 6185, 6196 (¶19) (1991).

[22] See comments of McCaw Cellular, GTE and the Committee for Effective Cellular Rules.

filing date or risk loosing areas that are "integral parts" of their business plans.[23] In effect, BellSouth favors a procedure that supports the de facto warehousing of this spectrum until the incumbent licensee is prepared to provide service. Under the procedure favored by BellSouth, when a Phase II application is filed, the incumbent licensee, who has had more than five years to fill-in its service area, can file on top of the applicant and outbid it for the spectrum. The BellSouth comments starkly demonstrate how an incumbent cellular licensee could use the 30-day window as part of a strategy of further delaying service to the public until its private business plans are met.

The Commission draws an arbitrary distinction between Phase I and Phase II in an attempt to justify its decision to change the latter. The Third Report and Order concludes that a one-day filing window for Phase I applications provides an ample opportunity to file because it is "a date certain known to all potential competitors in advance."[24] The Phase II first-come, first-served process, the Commission reasons, does not provide potential competitors an ample opportunity to file so the 30-day window provides potential Phase II applicants with the "ample" notice provided by Phase I. By ignoring the reality of the unserved area process, the Commission makes a distinction where there is none.

The processing rules provide the public with more than ample prior notice of filing opportunities. Potential unserved area applicants in any given cellular market have known since 1991 of the rules and deadlines for applying in cellular "white"

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[23] BellSouth comments at 17.

[24] Third Report and Order, ¶333.

areas.[25] To participate in either Phase I or Phase II of the process there are established dates that the public has been made aware of and can easily track. For Phase I, it is the 31st day after the close of the incumbent's five year fill-in period. For Phase II, it is the 32nd day after the close of the incumbent's five year fill-in period (if no application is filed on the 31st day) or the 121st day after the grant of a license to a Phase I applicant in any particular MSA/RSA.[26] So under the longest scenario, potential applicants have had over four years notice to prepare for Phase I or Phase II[27]. Under the shortest scenario, a potential applicant for Phase II will have 32 days after the close of the five year fill-in period to find an unserved area within an MSA/RSA, evaluate the value of the market and prepare an application. The "31st day, the 32nd day and the 121st day" filing criterion are all a "a date certain known to all potential competitors in advance."[28] The Commission's attempt to distinguish between the processes is arbitrary and capricious and upsets the "fair balance" it adopted in the 1991 Unserved Area First Report and Order.

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[25] Potential applicants for MSA/RSA that were licensed after 1991 will have had a full five years to prepare to apply. See 47 C.F.R. §22.947.

[26] If no Phase I application is granted, Phase II begins on the 31st day after the last Phase I application is dismissed.

[27] Petitioner submits that those with a legitimate interest in any unserved cellular market would not be able to claim that they were "blindsided" by applications filed on the 32nd day as this possibility was clearly explained by the rules. Moreover, if they had an interest in serving the market, they could have filed on the 31st day (Phase I). In either event, potential applicants have known since 1991 of the process and accompanying filing deadlines.

[28] The Petitioner fails to see how the process could injure incumbent cellular licensees, as BellSouth asserts. Again, they have had five years of protection to fill-in their MSA/RSAs. After that, if they wish, they may participate in Phase I on the 31st day or Phase II beginning on the 32nd day or 121st day. This is more than enough time for an incumbent to apply for "areas that are integral parts of their business plans" and they should not be granted an additional 30 days to file on top of an applicant who was not given a five year period to provide service to the market.

## IV. THE COMMISSION'S STATED GOALS FOR ESTABLISHING MUTUAL EXCLUSIVITY AMONG UNSERVED AREA CELLULAR APPLICATIONS CONTINUE TO BE MET BY THE COMBINATION OF A ONE-DAY FILING WINDOW AND FIRST-COME, FIRST-SERVED PROCESS

The Commission concluded in its 1991 Unserved Area First Report and Order that a combination of a Phase I one-day filing window coupled with a Phase II first-come, first-served process was the appropriate "compromise procedure" for making determinations of mutual exclusivity. The Commission concluded that this approach struck a "fair balance" in fulfilling the goals it desired to meet.[29]

G&M believes that the "compromise procedure" continues to meet these goals and that the Commission has not demonstrated changed circumstances that would justify upsetting the balance struck in the 1991 decision.

### A. Ensure that the process does not create an artificial incentive for parties to file applications for unserved areas

Under the current process, potential applicants are required to take the initiative if they wish to compete for unserved areas. They must complete a technical analysis to find "white" areas, determine the economic value of these areas, find financing and file an application. They do so without the benefit of using the work product of prior applicants for the same cellular area. Under the process adopted in the Third Report and Order, Phase I applicants will continue to have their work product protected from potential competitors. Phase II applicants, however, will be subject to copycat applications that make use of the work product and analysis

[29] Unserved Area First Report and Order at 6196, ¶19-20.

of the first Phase II applicant. The potential copycat applicant is saved the significant upfront cost required of the original Phase II applicant.[30] This creates an artificial incentive in two ways. First, as noted, the second and succeeding applicants save the upfront costs of preparing an original application. In addition, later applicants learn of valuable unserved areas they would otherwise not have discovered.

While the Commission claims that competitive bidding will deter these speculative or frivolous applications, just the opposite is true.[31] Copycat applicants will simply wait for others to identify valuable markets, file duplicate applications within 30 days and use the money they have saved in appropriating the work of the original applicant in the competitive bidding process. Thus, the new process creates an incentive to file after the original Phase II applicant identifies the market -- particularly with auctions as the deciding mechanism.

### B. Ensure that applicants are able to propose facilities that make engineering sense, are cost-effective, and cover geographic areas the applicant actually wants to serve

When an applicant is required to spend its own funds to complete the research that makes up an unserved area application, there is a greater chance that the engineering, market evaluation and budgeting are well thought out. The current process, especially for Phase II, demands a comprehensive effort by the applicant with its own funds. The Phase II applicant, under first-come, first-served

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[30] The Commission well understands that nothing in its rules prohibits a member of the public from copying an application verbatim and submitting this replica as its own. Such an action gives the copier a free ride on the engineering, legal and accounting costs that make up a Phase II application. The cost-savings can be significant. As G&M has indicated, it has already spent close to $100,000 in an attempt to identify unserved areas that comply with the Commission's rules.

[31] Third Report and Order at ¶334.

procedures, is willing to make the upfront investment in engineering and business evaluation because it knows its investment will be protected from copycat applicants. Moreover, if the Commission is faced with such copycat applicants who learn of market opportunities within the 30-day window, it can be sure that these applicants will have little understanding of the specific engineering requirements and market realities that go into a cellular unserved area business.

### C. Process applications in as rapid a manner as possible to promote prompt service to the public

The Phase I and Phase II process comes at the end of a five year protected fill-in period for the incumbent cellular licensee. During this time, segments of the public have been denied the opportunity to receive competitive cellular telephone service. The Commission's current process works to limit the instances of mutually exclusive applications that will further delay the initiation of service to long-denied members of the public. Moreover, the existing processing scheme better ensures that those applicants who do apply have done their own "homework" in advance and will be prepared to initiate service upon receiving an FCC authorization.

The revised Phase II 30-day filing window ensures that the Commission will be faced with far more mutually exclusive situations -- and the inevitable delay in processing these applications. The Commission's goal is not met by a rule that promotes the filing of mutually exclusive situations. Through hard experience over the last decade the Commission has learned that liberalizing the requirements imposed upon potential applicants does not serve the public interest. For the Commission is inundated with copycat applications that slows processing to a crawl. The ultimate public interest -- initiating a new radio service in an unserved or under-served

community -- is inevitably delayed for years.

The Commission argues that its competitive bidding process will allow it to award licenses expeditiously.[32] In so doing it misses the point. Competitive bidding provides the Commission with an additional means of selecting among mutually exclusive applicants if these situations occur. Auctions, however, are still a second-best method of authorizing service to the public because they involve mutually exclusive applicants and resulting delay. As Congress noted, the Commission should continue to promote "threshold qualifications, service rules and other means to avoid mutually exclusive situations, as it is in the public interest to do so."[33] However rapid the competitive bidding process proves to be, it will not be faster than avoiding mutually exclusive situations through tough, straightforward deadlines that limit copycat applications.[34]

### D. Provide sincere applicants with a fair opportunity to participate in the application process.

As G&M has argued in this Petition,[35] the current process provides more than a fair opportunity for sincere applicants to compete in the unserved area process.

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[32] Third Report and Order at ¶333.

[33] See supra, pages 7-8.

[34] Petitioner readily admits that auctions should prove faster than lotteries and/or comparative hearings in certain situations. However, the unserved cellular area process may prove to be an exception. Since unserved market opportunities come about on a rolling basis, the Commission will be faced with a continuous flow of mutually exclusive situations. Unless the Commission is prepared to hold ad hoc auctions, rather than batching and saving several markets for a larger auction, any individual unserved market that is otherwise ready for auction can expect a long delay until a critical mass of markets have been collected. Moreover, it is unclear how long the queue will be until the FCC completes PCS and other higher priority auctions.

[35] See supra. pages 10-11.

The process begins only after the conclusion of a five year fill-in period for the incumbent cellular licensees. Then an applicant can choose to file an application on the 31st day after the fill-in period (Phase I), the 32nd day after the fill-in period (Phase II) or the 121st day after the grant of a Phase I construction authorization. These are clear, straight forward deadlines that plainly provide an ample opportunity for a sincere applicant to enter the cellular business.

Adding an additional 30-day window to the Phase II process will, for the first time, allow speculators to profit from the efforts of previous applicants and give the speculators a competitive advantage in the resulting auction. No sincere applicant can claim that tacking on a 30-day notice for Phase II is necessary for a process that already provides a minimum of 32 days prior notice to anyone interested in providing cellular service to unserved areas.

## V. THE CURRENT PROCESS PROPERLY REWARDS THE ENTREPRENEURIAL EFFORTS OF PHASE II "PROSPECTORS" WITHOUT FORECLOSING THE RIGHTS OF OTHER APPLICANTS

Phase II applicants serve the public interest by identifying areas of the country that are still not reached by competitive cellular telephone service almost 15 years after the Commission first authorized cellular service. They are true prospectors, willing to take the monetary risk of finding the available spectrum gaps and serving these smaller markets. The Commission's existing rules recognize the need to provide these prospectors with the proper incentive structure. Phase II first-come, first-served processing comes at the end of a long series of opportunities for entrepreneurs to participate in the cellular industry. No one is disadvantaged by a process that is clear, straightforward and rewards individual initiative.

The current Phase II rule provides these prospectors with limited protection from other applicants, not by guaranteeing a license should a mutually-exclusive situation occur, but by guaranteeing that the efforts of these prospectors will not be stolen by others filing copycat applications. In that, G&M and other Phase II entrepreneurs simply ask that the Commission provide Phase II applicants with the same protection it has chosen to retain for Phase I applicants.

## VI. THE COMMISSION SHOULD CONSIDER AMENDMENTS TO ITS PHASE II PROCEDURE THAT ARE CONSISTENT WITH ITS ORIGINAL PROCESSING GOALS

G&M proposes here three amendments to the unserved area licensing process that it believes comply with the Commission's articulated processing goals in its Unserved Area First Report and Order and the concern voiced by it in the Third Report and Order. Any or all of these amendments insure that potential applicants have ample notice of clear deadlines before the start of any Phase II filing opportunity. At the same time, these amendments protect the work product of the first Phase II filer in any given market.

The first amendment would modify the notice given to the public under existing rule 22.949(b)(1) while maintaining first-come, first-served procedures. If no Phase II initial applications are received for a market, G&M suggests that the Commission extend the time before Phase II begins to at least 62 days after the expiration of the relevant five year build-out period.[36] With this amendment,

[36] The final sentence of 47 C.F.R. §22.949(b)(1) would then read as follows: "If no Phase I initial applications are received for a market and channel block, Phase II applications for that market and channel block may be filed on or after the 62nd day after the expiration of the relevant five year build-out period."

potential filers receive at least 30 days notice for any of the "triggers" that start Phase II: 121 days if a Phase I application is granted; 31 days if no Phase I application is ultimately granted in a market; and 31 days if no Phase I applications are filed in a market.

The second amendment would provide additional protection to initial Phase II filers under the new 30-day window rule. Once a Phase II application was filed, the Commission would announce that fact in a Public Notice that included relevant CGSA and market information. The application itself would not be made available to the public for viewing until after the close of the 30-day filing window. Petitions to Deny would be due 30 days or more after the application was first made available for public inspection.

G&M's third proposal would operate in instances of mutual exclusivity among Phase II applicants. If mutually exclusive applications were filed as a result of a 30-day "cut-off" window, the initial Phase II application in that filing group (the application that triggers the cut-off period) would receive a bidding preference in the resulting auction. This preference could take the form of a bidding credit, decreased upfront payment and down payment, installment payments, etc.. The preferences would reward the efforts of applicants who discover unserved areas, but not act to foreclose legitimate competitors for the spectrum. The Commission has broad discretion to fashion such innovative procedures for its auctions when it would serve the public interest and goals established by Congress.[37] In fact, Congress requires the Commission to develop auction methodologies that promote the development and

[37] See 47 U.S.C. §309(j)(3) and §309(j)(4).

rapid deployment of new technologies; promote economic opportunity and competition; avoid excessive concentration of licenses; and promote the efficient and intensive use of spectrum.[38]

These suggested amendments, as well as the current unserved area process, depend upon the Commission releasing timely Public Notices with the pertinent deadlines and maintaining accurate and up-to-date cellular information in its public reference rooms or its contractor's data base. G&M has experienced continuous frustration in preparing its applications due to the lack of current data or missing information in the Commission's files.[39] Without this information, both Phase I and Phase II potential applicants are simply unable to submit proposals that are anything but educated guesses as to unserved cellular areas. G&M urges the Commission to review its information availability procedures as part of this reconsideration in order to improve the integrity and overall fairness of the unserved area process.

## VII. CONCLUSION

G&M respectfully urges the Commission to reconsider the provision of its Third Report and Order that instituted a 30-day filing window for Phase II unserved

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[38] House Conference Report at 482. The package of preferences given to a Phase II "pioneer" should be equal to or greater than those awarded to designated entities (small businesses, rural telephone companies, women or minority-controlled businesses) who may file in the same market. Otherwise, the incentive to be the pioneering applicant is lost. The pioneer would also be eligible for those bidding preferences awarded to designated entities if it qualifies as a designated entity.

[39] For example, G&M has discovered that the required final system information updates (SIUs) from incumbent cellular carriers are often not available to the public in a time frame that would permit a Phase I or Phase II potential applicant to analyze markets for unserved areas prior to the filing deadlines. The Commission's Cellular Radio Data Base, containing all amendments and pending requests, has not been updated since October although G&M is aware that thousands of changes have been authorized since that time. This "data lag" is unfair to the public who depends upon the information to prepare an unserved area application that conforms with the Commission's technical rules and filing time frames.

area cellular applications as well as other CMRS applications. G&M asks the Commission to recognize the unique nature of the Phase II process vis a vis other Part 22 services that clearly justifies continuation of a first-come, first-served procedure. The procedure encourages entrepreneurs to provide cellular telephone service to unreached areas of the country by protecting them from speculative applications. The Commission recognized the need for the current process when it struck a "fair balance" in its 1991 Unserved Area First Report and Order.

G&M respectfully submits that the Commission can identify no legitimate reason for changing that carefully-crafted balance. The prospect of competitive bidding is not, as Congress warned, a justification for creating more opportunities for mutually exclusive situations, but merely a means of resolving those that occur. The public interest is better served by a processing scheme that encourages careful research and planning by a prospective cellular licensee and discourages filings by those who depend on the work product of competitors.

Respectfully submitted,

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